

McMahon (Migration) [2017] AATA 1208 (17 July 2017)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mr Andrew Kirk McMahon
VISA APPLICANTS:	Ms F Lastenia Alva Portilla Mr Tomas Kenneth Uzuriaga Alva
CASE NUMBER:	1613594
DIBP REFERENCE(S):	BCC2014/1521999
MEMBER:	Russell Matheson
DATE:	17 July 2017
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decisions not to grant the visa applicants Partner (Provisional) (Class UF) visas.

Statement made on 17 July 2017 at 9:09am

CATCHWORDS

Migration – Partner (Provisional) (Class UF) visa – Subclass 309 – Insufficient evidence of relationship – Parties living in separate countries – Credibility issues – Inconsistent information – No mutual commitment to a shared life to the exclusion of all others

LEGISLATION

Migration Act 1958, ss 5F, 65, 359AA

Migration Regulations 1994, Schedule 2, cl 309.211(2), cl 309.221, cl 309.3, r 1.15A(3)

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 8 July 2016 to refuse to grant the visa applicants Partner (Provisional) (Class UF) visas under s.65 of the *Migration Act 1958* (the Act).
2. The applicant (the visa applicant) is a national of Peru born in September 1963. She applied for the visa on 20 June 2014 on the basis of their relationship with their sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Relevantly to this matter the primary criteria include cl.309.211(2).
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211(2) because the delegate was not satisfied the applicant was the spouse of the sponsor as defined in s.5F of the Act. The sponsor ('review applicant') seeks review of the delegate's decision.
4. The sponsor appeared before the Tribunal on 28 June 2017 to give evidence and present arguments. The Tribunal also received oral evidence from the applicant and a witness, the niece of the applicant.
5. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

6. Background

7. The applicant is a 53 year old woman from Peru. She has previously been in a de facto relationship for a period of ten years. There is one son born to the relationship. The son is included as dependant in this application. The applicant has married a 57 year old Australian citizen living in Wollongong who has had no previous relationship. The parties were introduced to each other via the internet by a family member of the applicant who lives in Australia.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. The issue in the present case is whether the applicant is the spouse of the sponsor as defined in s.5F of the Act.
9. The Tribunal had taken into consideration all the evidence in the Department's file BCC2014/1521999, folios numbered 1-308 and the Tribunal file.

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

10. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen.

11. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion as to these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

ARE THE PARTIES VALIDLY MARRIED?

12. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The applicant provided with her application a copy of the couple's marriage certificate registered in New South Wales in January 2014. There is no evidence before the Tribunal to indicate that the marriage is not valid. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

ARE THE OTHER REQUIREMENTS FOR A SPOUSAL RELATIONSHIP MET?

13. The Tribunal was presented with limited additional evidence and also had the benefit of oral evidence from the applicant, the sponsor ('the review applicant') and a witness ('the applicant's niece'). The Tribunal found the evidence given by the applicant and the sponsor inconsistent, lacking in detail and at times not credible.

14. Financial aspects

15. The Tribunal considered the financial aspects of the relationship and accepts there is a degree of difficulty in establishing and maintaining joint financial assets when the parties live in separate countries. The sponsor told the Tribunal he was currently working as a shopfitter and living off his inheritance. He also said that he wasn't sure what the applicant did for work it was hard because of the language barriers, but he did know that she sold guinea pigs. The applicant said that she used to own guinea pigs and had previously worked with the local council and helped the disadvantaged. The applicant told the Tribunal the sponsor was living off his inheritance and he was working in the building industry. The parties had no knowledge of each other's income or savings. The Tribunal is of the view the couple have little knowledge of each other's financial affairs.
16. The sponsor told the Tribunal that he has supported the applicant by sending money transfers to her in Peru. He said that he had sent the applicant approximately twenty thousand dollars during their relationship. Money transfer receipts provided to the Tribunal for the period from May 2014 to April 2017 were produced as evidence. The applicant informed the Tribunal that the sponsor sent her money every month. The Tribunal questioned the sponsor and the applicant as to how the money was used. The sponsor said that it was spent on something to do with her house, bills and expenses. The applicant told the Tribunal that she utilised the money for renovating her house, maintenance, utility bills, daily expense's and her son's education. Further, she stated that she owned farmland that produced vegetable crops and that she paid workers to pick the crops with the money sent to her from the sponsor. She also said that she sold the produce to earn an income. The sponsor stated that he did not know the applicant was earning an income and he does not know what she is doing one hundred per cent of the time. He further stated that he does not have normal conversations with the applicant because she can't speak English.

17. The sponsor said that he paid for everything when the parties socialised and travelled together in Peru and Australia. The applicant told the Tribunal that she supports and pays for the education of her son who is a full time student. The applicant told the Tribunal that she owns half the house that she is renovating and living in and the other half is owned by her former de facto partner who is the biological father of her son. She further stated that she would leave her half of the house for her sister to mind to allow the couple to stay there when they returned to Peru to visit. The sponsor told the Tribunal that he would establish a joint account with the applicant if the applicant was granted a visa. The parties declared that they have no joint account, joint liabilities or major assets together. There is little evidence before the Tribunal of the parties pooling or sharing their financial resources for daily expenses or that they have any future financial plans or commitments.

18. Nature of the Household

19. The Tribunal has considered the nature of the household. The parties told the Tribunal that they developed a relationship after they were introduced to each other by the applicant's niece in 2012. They said that they would talk to each other on the intranet and the applicant's niece would interpret their conversations. The applicant told the Tribunal that her niece had promised her twenty years ago that she would sponsor her to come to Australia at no expense to herself. The applicant was sponsored by her niece and came to Australia in October 2013 to visit relatives and returned to Peru in January 2014. The applicant stated that she met the sponsor face to face for the first time in Australia in November 2013. The sponsor stated that the applicant came to Australia to visit her niece and not him. The Tribunal has concerns that the applicant was in Australia for a month before meeting the sponsor and the main purpose of her visit was to visit relatives living in Australia.
20. The sponsor told the Tribunal that he proposed to the applicant in December 2013 during her visit to Australia and they were married in January 2014. He said that he proposed to the applicant over dinner at the niece's ('the witness') home. The applicant and the niece both confirmed that the sponsor proposed to the applicant at a Chinese restaurant in Wollongong. The sponsor told the Tribunal that the applicant spent the day with him and stayed overnight with relatives during her stay in Australia. The sponsor originally said that the applicant stayed at his unit for two to three days after the wedding. He then said she stayed sometimes at his unit and sometimes with relatives during her stay in Australia. The applicant told the Tribunal that she stayed at the sponsor's unit for approximately a month and a half. The witness said that the applicant stayed at the sponsor's unit approximately eighty per cent of the time during her visit in Australia. The applicant said that when she stayed at the sponsor's residence in Australia she did the cooking, cleaning, washing and the sponsor helped with the dishes. She said that the couple shared the household responsibilities. Evidence contained in the Department file shows that when questioned by an officer of the Department the applicant said that she had not lived with the sponsor at all during her time in Australia and had stayed with her niece the whole time.
21. The Tribunal questioned the parties as to what would be their living arrangements if the applicant and her son ('the secondary applicant') were to be granted a visa to live in Australia. The sponsor said that he lived in a one bedroom unit in Wollongong. The sponsor told the Tribunal the applicant was having dramas with her son and that he may not come to Australia. He further stated he didn't know exactly what the living arrangement would be and would work it out if it happened. He said there were plenty of places for the son to stay with relatives or they could move to bigger premises. The applicant told the Tribunal the sponsor lived in a two bedroom unit and that she and her son would live with the sponsor. She then said that each bedroom had a doorway and each room had its own wooden bed. The sponsor went on to clarify that he had changed things around and there used to be a petitioned wall with a pull down bed and you could interpret it as a two bedroom unit, but it was really a one bedroom unit.

22. The parties stated the sponsor visited the applicant in Peru in December 2014 and was accompanied by the applicant's niece. The sponsor said he was aware the applicant was in a shared arrangement with her former partner and that he stayed at the applicant's sister's house for the first two days. He said that the couple travelled together to a number of places in Peru with the applicant's niece. The parties told the Tribunal that they shared a room together at different hotels on their travels. There is very little evidence before the Tribunal that the couple established a joint household together at any time in Australia or Peru.
23. The Tribunal questioned the sponsor as to why he had travelled to other countries overseas and not returned to visit the applicant in Peru since 2014. The sponsor stated that it was four thousand dollars dearer to travel to Peru than most other countries. He further stated that he was training for a body building competition and travelled to Thailand to purchase body building supplements.

24. Social aspects

25. The Tribunal has considered the social aspects of the relationship. The parties' provided photographic evidence to the Tribunal of their travels in Australia and Peru together, their wedding and limited social activities with relatives. The applicant visited Australia with her son from October 2013 to January 2014. The parties said they travelled to Cairns for a week with the applicant's son and niece. The sponsor said that the couple went on trips to places such as Jervis Bay, Moss vale, Vincentia and Huskisson and they dined out, went to the beach and the movies and visited relatives together when the applicant visited Australia in 2013. He also said that he did not introduce the applicant to any of his friends because there was no point in it because the applicant was in Australia to visit her relatives and she wanted to spend time with them. The applicant stated that she did not know any of the sponsor's friends, only Rosa who was a friend of her niece at the gym.
26. The sponsor visited the applicant in Peru in 2014 and the parties told the Tribunal that they travelled to places such as Cuzco and Machu Picchu and stayed in a hotel together. The sponsor also told the Tribunal that he had met a number of the applicant's relatives in Peru but he could not remember their names. The Tribunal accepts that the couple have undertaken some joint social activities and travelled together. There is little evidence before the Tribunal that the couple represented themselves as being in a marital relationship and there is limited recognition of their relationship by other people, other than the immediate relatives of the applicant.

27. Commitment

28. The Tribunal has considered the commitment of the parties' to each other. The sponsor told the Tribunal he is not interested in buying a house and just wanted to live a comfortable life. He further said that he had made the applicant the beneficiary of his will. He told the Tribunal that he did not produce a copy of the will as evidence because he didn't know that he had to. The sponsor said that he did not know what the applicant would do for employment once she came to live in Australia. He went on to say that she comes from a third world country and is pretty handy and that she will find something to do. He also stated that he had a close knit relationship with the applicant and that she was easy to get along with and was strong in character. The applicant said that she would like to come to Australia to live with her husband, find a job and look after her son. She said that she was studying English and would try and find work as a nanny. The couple said that they wanted to travel the world together.
29. The sponsor said as far as he knows the relationship between the couple is a long term one and that it is difficult maintaining a long distance relationship. The applicant told the Tribunal that she viewed the relationship a long term one because their fate is set and that the

couple are at an age where they are not likely to change partners. The parties' informed the Tribunal that if the applicant wasn't granted a visa the sponsor may move to Peru to live. The witness told the Tribunal that the applicant had told her if she wasn't granted a visa to live in Australia the sponsor will move to Peru to live. The couple said that they had comforted and supported each other during the time of the refusal of the visa application. There is little evidence before the Tribunal that suggests that the couple view their relationship as a long term one. There is little evidence before the Tribunal that the couple have had a meaningful discussion about their future plans and a shared life together. The Tribunal places little weight on this aspect of the relationship.

30. S.359AA

31. The Tribunal had concerns in relation to conflicting evidence given by the parties at the Tribunal hearing. The Tribunal then discussed with the sponsor ('the review applicant') in accordance with s.359AA of the Act. The Tribunal explained the relevance and consequences of the information and invited the sponsor to comment on or respond to the information. The Tribunal also advised the sponsor that he may seek additional time to comment on, or respond to, the information; he did not seek additional time.
32. The Tribunal put to the sponsor evidence given by him about the living arrangements of the applicant when she visited Australia from October 2013 to January 2014. The sponsor told the Tribunal at the hearing that the applicant had only stayed two or three nights at his unit in Wollongong after their wedding in January 2014. He later made comments that she stayed sometimes at his unit and sometimes with relatives during her stay in Australia. The applicant told the Tribunal that she had stayed at the sponsor's unit for a month and half. The witness at the Tribunal said the applicant stayed at the sponsors unit for eighty per cent of the time she was in Australia. The Tribunal brought to the attention of the sponsor the discrepancies in the evidence given at the hearing and the fact the applicant had previously told the Department that she had stayed the whole time when she was in Australia with her niece. The sponsor told the Tribunal that he misinterpreted the question and thought he was being asked about how long the applicant stayed at his unit after their wedding. He further stated that he could not remember exactly how long she stayed at his unit but it was a reasonable time. He went on to say it could have been twenty to thirty times and that it was more than the amount of time that she spent with relatives.
33. The Tribunal put to the sponsor his evidence in relation to the circumstances of his proposal to the applicant. The sponsor at the hearing told the Tribunal he proposed to the applicant at a dinner party at the home of the applicant's niece. The applicant and the witness both told the Tribunal when giving evidence that the sponsor proposed to the applicant at a Chinese restaurant in Wollongong. The sponsor responded saying that it was no big deal and that he thought of the idea to propose to the applicant at the home of the niece before they went out to dinner at the restaurant. He then said that he proposed to the applicant at the restaurant.
34. The Tribunal put to the sponsor as to why he could not remember an important date such as his wedding. The sponsor said he was working nightshift and he was half asleep. He said he knew when it was and just because he forgot the date, doesn't mean that he forgot the event. He also stated that he has trouble remembering other dates as well. The Tribunal found the evidence given by the sponsor in relation to the abovementioned issues problematic and is not indicative of the parties as being in a genuine and committed relationship.

35. Findings

36. The Tribunal has considered the evidence of the parties both individually and cumulatively. As set out above, the parties provided inconsistent information during the Tribunal hearing

which calls into question the credibility of the information they provided in support of the visa application. The explanation of the sponsor as to the living arrangements of the applicant and her son when they visited Australia were inconsistent and lacked credibility. The applicant's version of events in the primary application as to where she stayed in Australia is contrary to what she told the Tribunal. She presented evidence to the Tribunal that she stayed at the sponsors unit for six weeks and in the primary application stated that she spent the whole time with relatives. The parties' recollection of where and when the sponsor proposed to the applicant is contradictory. The sponsors lack of commitment to the relationship when giving evidence in relation as to why he travelled to other places overseas and did not return to visit the applicant in Peru. The fact the applicant was collected at the airport by relatives and spent a month in Australia before meeting the sponsor face to face is not indicative of a genuine and committed relationship. The sponsor said he did not introduce the applicant to his friends because it was not relevant because the applicant was in Australia to visit relatives and not him. The parties lack of representing themselves as being in a marital relationship to other people other than immediate family members of the applicant when the applicant visited Australia is not consistent with the existence of a genuine and committed relationship. The lack of the couple's ability to communicate effectively with each other is of concern to the Tribunal. The Tribunal is of the view; the issues raised above have highlighted the inconsistencies and the lack of credibility of much of the evidence given to the Tribunal at the hearing by the parties.

37. Having considered the entirety of the relationship, the Tribunal finds the weight of the evidence does not support a finding that the couple are in a genuine and continuing relationship. There is little evidence of co-habitation or establishing a joint household together, little knowledge of each other's financial affairs, limited social interaction and recognition from the wider community that the couple are in a marital relationship. The Tribunal accepts that in part, certain aspects of the relationship show that the couple are in a relationship. The Tribunal is of the view there is little evidence before the Tribunal to substantiate that the couple are in a spousal relationship.
38. Given these findings the Tribunal is not satisfied that at the time the visa application was made and at the time of this decision the parties' were in a spousal relationship. There is no information before the Tribunal that the visa applicant would satisfy any of the alternate criteria for the grant of the visa.
39. The Tribunal finds that the applicant and the sponsor do not have a mutual commitment to a shared life to the exclusion of all others and therefore the visa applicant does not meet the criteria in s.5F(2)(b) of the definition of the spouse of the sponsoring partner. Accordingly, the Tribunal finds the applicant does not meet the criteria in cl.309.211 or cl.309.221.
40. As the primary applicant does not satisfy cl.309.211(2), the secondary applicant is unable to satisfy the secondary criteria in cl.309.3.
41. For the reasons above, the visa applicants do not satisfy the criteria for the grant of the visa.

42. **DECISION**

43. The Tribunal affirms the decisions not to grant the visa applicants Partner (Provisional) (Class UF) visas.

44.

Russell Matheson
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).